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80-1039
No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT T. MACIEJEWSKI, et al.,

Petitioners,

vs.

ENTERTAINMENT CONCEPTS, INC. III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether municipal legislators are entitled to absolute immunity from liability for attorney's fees awards under the Civil Rights Attorney's Fees Awards Act 42 U.S.C. §1988 (1979 Supp.) where the underlying civil rights action is based solely on legislative acts.

2. Whether an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act must be predicated upon the liability of the defendants for a violation of the plaintiff's civil rights.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners Robert T. Maciejewski, Ben Bender, William W. Boesch, Edward T. Mecler, Betty Werth, Gregory Szymski, John A. Gradle, Richard E. Johnson, Thomas Fischer, Marsha Kusreau, Sally Wilkins and Helen Budo respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 23, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Illinois.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 23, 1980 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> §1988 (in pertinent part). The Civil Rights Attorney's Fees Awards Act.
>
> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The following Provisions are set out in pertinent part in the Appendix to this Petition.

Illinois Constitution of 1970, Article VII: Local Governments

> Section 1. Municipalities and Units of Local Government
>
> Section 7. Counties and Municipalities Other Than Home Rule Units

Illinois Revised Statutes (1979), Chapter 24: Cities and Villages

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STATEMENT OF THE CASE[1]

Petitioners are various officials of the Village of Westmont, Illinois. Robert T. Maciejewski is the Mayor and President of the Village Board of Trustees. The Village Board comprises Ben Bender, William W. Boesch, Edward T. Mecler, Betty Werth, Gregory Szymski and John A. Gradle. Richard E. Johnson is the Village's Chief of Police, Thomas Fischer is the Director of Building and Zoning and Marsha Kusreau, Sally Wilkins and Helen Budo are members of the Village's Movie Review Committee.

The respondent Entertainment Concepts, Inc., III, is a for-profit corporation which is in the business of operating movie theatres. Since December 22, 1978 the respondent has continuously exhibited motions pictures in the Village of Westmont at a movie theatre known as the Studio Eleven, Cinema I and Cinema II. On September 21, 1979 the respondent began advertising on its marquee, "COMING SOON, ADULT MOVIES."

In 1978, the Board of Trustees of the Village of Westmont amended Chapter 5, Article VII, Division 2 of its Municipal Code to add Section 5-136, "Prohibition of Exhibition of Obscene Motion Pictures." Section 5-136 created a Movie Review Committee to review motion pictures and determine whether or not they are obscene. The ordinance also empowered the Mayor to suspend the motion picture license of an exhibitor of obscene motion pictures, the suspension to be for not more than 90 days for the first offense and 180 days for the second offense. The pen-

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[1] The Statement of the Case is based upon the allegations in the complaint filed by Entertainment Concepts, a copy of which is included in the Appendix hereto. Although only the ordinances were offered into evidence, the facts in the allegations are not in dispute.

alty for a third offense was the permanent revocation of the offender's license by the Mayor.[2]

On October 1, 1979 the Board of Trustees of the Village of Westmont amended its zoning ordinance to create a new category, "Adult Movie Indoor Theatres," designating that category as a "special use."

On October 25, 1979, Entertainment Concepts, Inc. III, the respondent herein, filed suit under 42 U.S.C. §1983 in the Northern District of Illinois, attacking both ordinances and alleging that they were adopted to prevent the exhibition of a certain type of film by the respondent. The Mayor and the members of the Board of Trustees were sued as individuals and in their official capacity and the Police Chief, the Director of Building and Zoning, and the members of the Movie Review Committee were named as defendants in their official capacity only. The plaintiff alleged a "purposeful intimidation and bad faith harassment" on the part of the petitioners, who had thus allegedly deprived the respondent of its constitutionally protected rights under the First and Fourteenth Amendments. The respondent sought declaratory and injunctive relief as well as monetary damages.

At the time that Entertainment Concepts initiated this action, the Village officials had made no attempt to enforce the two ordinances or to prevent the respondent from exhibiting any movies, and the respondent had not filed an application for a special use permit under the zoning ordinance.

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[2] Paragraph 2 of Section 5-136 was amended on October 29, 1979, to detail the definition of obscenity. However, the Court of Appeals noted that the amendment had no effect on the case and focused instead on the "adult movie" ordinance. See pp. 3 and 7 of the Appendix hereto.

The District Court conducted a hearing at which Entertainment Concepts offered no evidence that any action had been taken to enforce the ordinances or that its motion picture license had ever been suspended by the Mayor under Section 5-136. Following the hearing the Court permanently enjoined the petitioners herein from enforcing the two challenged ordinances against Entertainment Concepts in its operation of the Studio Eleven theatres. In a separate order, the District Court specifically denied the respondent's other requests for relief, finding that it had "failed to prove that there is any need for a declaratory judgment . . . or that plaintiff suffered any monetary damages."

The petitioners herein appealed to the Seventh Circuit Court of Appeals and Entertainment Concepts filed a cross-appeal from the denial of its subsequent petition for attorney's fees. The Court of Appeals held that the respondent's action was ripe for consideration and that the ordinances were unconstitutional, and accordingly affirmed the District Court's order enjoining enforcement against Entertainment Concepts. The Court of Appeals reversed the District Court on the question of attorney's fees, holding that Congress intended the Civil Rights Attorney's Fees Award Act to abrogate any immunity possessed by the Village officials, and remanded the cause for the framing of an appropriate fee award. See pp. 21-23 of the Appendix hereto.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW AS IT PERTAINS TO VILLAGE LEGISLATORS CONFLICTS WITH THIS COURT'S DECISION IN SUPREME COURT OF VIRGINIA v. CONSUMERS UNION OF THE UNITED STATES.

In finding that the Village officials, petitioners herein, are liable in their official capacities for the respondent's attorney's fees, the Seventh Circuit Court of Appeals held that, in enacting 42 U.S.C. §1988, Congress intended to abrogate "any immunity possessed by the Village officials," citing *Supreme Court of Virginia* v. *Consumers Union of the United States,* ..... U.S. ....., 100 S.Ct. 1967, ... L.Ed. 2d ..... (1980). See p. 21 of the Appendix hereto. However, the court below apparently disregarded this court's reasoning in *Consumer's Union* and made no mention of the respective roles of the various Village officials. Consequently, the lower court arrived at a conclusion that is in direct conflict with the very case on which it relied.

In *Consumers Union*, an action was brought against the Virginia Supreme Court and its Chief Justice seeking a declaratory judgment that the defendants there had violated the First and Fourteenth Amendments in promulgating and enforcing rules which prohibited attorney advertising. The District Court declared the rule unconstitutional on its face and permanently enjoined its enforcement. The plaintiff sought attorneys' fees under Section 1988 and the District Court held that the individual defendants were immune from attorneys' fees liability in their individual capacities. The District Court concluded that

it would be unjust under the circumstances for the State Bar and its officers, who had also been named as defendants, to be held liable for attorneys' fees in their official capacities, because those defendants did not have the power to change the rules and had recommended to the Virginia Supreme Court that the rule be changed. The District Court did, however, order the Supreme Court of Virginia and its Chief Justice to pay the plaintiffs' attorneys' fees, basing its ruling on the Virginia Supreme Court's failure and refusal to amend the rule to conform with constitutional requirements. *Consumers Union of United States, Inc.* v. *American Bar Association,* 470 F.Supp. 1055, 1063 (E.D.Va. 1979).

This Court dissected the actions of the Virginia Supreme Court into legislative, judicial and enforcement aspects and concluded that the Virginia Court was acting in a legislative capacity with regard to its rule-making powers, which had been delegated to the Virginia Court by the legislature. Noting that, had the Virginia legislature enacted the State Bar Code, it would have been absolutely immune to a suit brought against it, its committees or members, for refusing to amend the Bar Code, this Court reasoned that the Virginia Court and its members must also be immune from suit when acting in their legislative capacity. 100 S.Ct. at 1975.

This Court went on to explain that the Virginia Court also performed a traditional adjudicative task in hearing appeals from decisions on disciplinary cases and that the Virginia Court also had an independent enforcement authority of its own. Without considering whether judicial immunity protected the Virginia Court from suits for declaratory or injunctive relief, this court concluded that the Virginia Court's inherent and statutory enforcement powers made the Virginia Court and its Chief Justice sub-

ject to the action brought by the Consumers Union under Section 1983. 100 S.Ct. at 1977.

However, the Court added in essence that simply being subject to suit under Section 1983 does not mandate an award of attorney's fees under Section 1988. Turning to the legislative history of Section 1988 as it had previously done in *Hutto* v. *Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed. 2d 522 (1978), the Court found no indication that Congress had intended to allow attorney's fees to be awarded where the award would be premised on acts for which the defendants would be absolutely immune from suit. Because the District Court's award of attorney's fees had been based upon the Virginia Court's exercise or non-exercise of its legislative powers, actions for which the Virginia Court enjoyed absolute immunity, this Court held that it was an abuse of discretion for the District Court to award fees against the Virginia Court, such award running counter to the Virginia Court's absolute legislative immunity. 100 S.Ct. at 1978.

As was the case in *Consumers Union,* the case at bar is premised solely upon a legislative act of the Village Board, a fact which is underscored by the allegations in the complaint and the proof offered at trial. In paragraph 9 of its complaint, Entertainment Concepts alleged an "unlawful conspiracy and/or plan" on the part of the defendants. In paragraph 11 it alleged that Section 5-136 was enacted "for no other reason than to harass and intimidate . . . well knowing the patent illegality of same" while it alleged in paragraph 13 that the "adult movie" amendment was enacted "with the express purpose of harassing, delaying and ultimately preventing the intended exhibition of motion picture films." In addition, Entertainment Concepts sought $250,000 damages only from the President and members of the Village Board. Furthermore, the only

evidence offered by the respondent herein, Entertainment Concepts consisted of the minutes of the Board's meeting at which it amended the zoning ordinance, the texts of the two ordinances and testimony regarding the procedures for obtaining a special use permit. Entertainment Concepts offered no evidence to support either its claim of damages or its additional allegations that it had booked a particular film for November 9, 1979 and that one of the petitioners herein, Robert Maciejewski, the Mayor and President of the Village Board, had held up issuance of Entertainment Concepts' license. Nor did Entertainment Concepts offer evidence that it had applied for or been denied a special use permit under the zoning ordinance or that any Village official had threatened enforcement of the ordinance or taken any steps to enforce it.

It is eminently clear, then, that the entire focus of the case presented by Entertainment Concepts, the respondent herein, was on the members of the Village Board and their motives and actions surrounding the enactment of the two ordinances. However, applying this Court's ruling in *Consumers Union,* the very acts upon which the respondent bases its Section 1983 claim are legislative acts for which the members of the Village Board enjoy absolute immunity.

It is beyond question that a municipality is a creature of the state. The general rule is stated in McQuillin, *Municipal Corporations,* §2-08a:

> A municipal corporation is generally regarded by the courts as a subordinate branch of the government of the state, and therefore municipal administration is an instrumentality of state administration.

The Illinois Constitution of 1970, provides that a village is a municipality (Ill. Const. 1970, Art. VII, Section 1)

and, as such, has "only powers granted . . . by law" (Ill. Const. 1970, Art. VII, Section 7). Petitioners Bender, Boesch, Mecler, Werth, Szymski and Gradle, members of the Village Board, are the corporate authorities of the Village of Westmont, Ill.Rev.Stat. 1979, ch. 24, §1-1-2(2), and thus, are empowered by the Legislature to "pass all ordinances and make all rules and regulations proper or necessary, to carry into effect the powers granted to municipalities." Ill.Rev.Stat. 1979, ch. 24, §1-2-1. Among the powers that the Village Board may effectuate through the passage of ordinances is the power to establish land use districts, to prohibit uses incompatible with the character of the districts and to provide for a classification for special uses. Ill.Rev.Stat. 1979, ch. 24 §§11-13-1 and 11-13-1.1. The Village Board is also empowered to license, tax and regulate all places of amusement. Ill.Rev.Stat. 1979, ch. 24, §11-42-5.

Thus, in amending the Village's ordinances to prohibit the exhibition of obscene movies and to classify "adult movie theatres" as special uses, the members of the Village Board were exercising legislative powers which had been delegated to them by the State Legislature, as the Virginia Court in *Consumers Union* had done. As in *Consumers Union*, had the Illinois Legislature chosen to retain the power to regulate land use and businesses on a local basis and had enacted the same legislation as did the Village Board herein, the individual members of the Legislature would have been absolutely immune from suit. 100 S.Ct. at 1975.

Accordingly, the award of attorneys fees against petitioners Bender, Boesch, Mecler, Werth, Szymski and Gradle, all members of the Village Board, should be found to be in direct conflict with this Court's ruling in *Consumers Union* that to award attorneys fees under Section

1988 against officials acting in a legislative capacity is contrary to the principle of absolute legislative immunity.

The decision of the Court of Appeals poses a question that is of grave concern to all local governments. Throughout this Country, countless municipal legislators regularly enact ordinances and rules pursuant to powers granted them by state statute. The states have chosen to delegate these powers to the municipalities to enable them, as well as the states, to govern more effectively at a local level. The question of whether such legislators are protected by legislative immunity is a point of law which needs clarification. The need for clarification is magnified by the Court of Appeals' decision which, if allowed to stand as precedent, can seriously and negatively affect the ability of local governments to govern.

II. THE DECISION BELOW IS CONTRARY TO 42 U.S.C. §1988 IN THAT IT MANDATES AN AWARD OF FEES IN THE ABSENCE OF ANY LIABILITY IN LAW OR FACT UNDER 42 U.S.C. §1983 FOR A VIOLATION OF CIVIL RIGHTS.

By awarding attorneys' fees against the petitioners herein, who are either the members of the Village Board, who are protected by legislative immunity, or the Village enforcement officials, who took no actions against the respondents herein, the court below has mandated that attorneys' fees be awarded without regard for the existence of any underlying interference with the respondents' civil rights for which the petitioners herein may be held liable. Petitioners submit that this ruling of the Seventh Circuit Court of Appeals was in error, for implicit in this Court's opinion in *Consumers Union* is a fundamental requirement that attorneys' fees must be based upon an infringement of civil rights for which the parties being assessed fees may be held liable.

In arriving at its conclusion in *Consumers Union,* this Court analyzed the rules and functions of the Virginia Court and Bar with regard to the enforcement of the State Bar Code. Finding that the basis of the award for attorneys' fees was that the Virginia Court had failed to amend the State Bar Code, an action in which the Virginia Court performed in its legislative capacity, this Court held that the absolute legislative immunity from actions under Section 1983 necessarily extended to awards of attorneys' fees under Section 1988 as well. This Court did note, however, that had the award been against the Virginia Court in its enforcement role, the award would have been proper. 100 S.Ct. at 1978. The absolute legislative immunity of petitioners Bender, Boesch, Mecler, Werth, Szymski and Gradle, has already been discussed. However, unlike the Virginia Court in *Consumers Union,* no award of attorneys' fees against the members of the Village Board could ever be proper in this case, for their actions were strictly legislative, and they have no enforcement role with regard to the ordinances in question.

The remaining petitioners, Robert T. Maciejewski, the Mayor and President of the Village Board, Richard E. Johnson, the Chief of Police, Thomas Fischer, the Director of Building and Zoning, and the members of the Movie Review Committee, Marsha Kusreau, Sally Wilkins and Helen Budo, are all involved in some way in the enforcement of the two ordinances enacted by the Village Board. Had these petitioners been the only defendants in this case, it is clear that no award of attorneys' fees against them would be proper. Entertainment Concepts, the respondent herein, offered no evidence that these particular petitioners had made any effort to enforce the ordinances, nor did Entertainment Concepts offer any proof that it had taken any action of its own, such as applying for a

special use, that would have brought the ordinances into operation against it. There being no showing that petitioners Maciejewski, Johnson, Fischer, Kusreau, Wilkins and Budo had ever in any way violated the respondent's civil rights, it must follow that they have no liability under Section 1983 and can, therefore, not be held liable for attorneys' fees under Section 1988.

The court below rested its award of attorneys' fees against the petitioners on its conclusion that the respondents herein had prevailed against the petitioners within the meaning of Section 1988. See p. 20 of the Appendix hereto. It is eminently clear from the record that the respondents herein could not have "prevailed" against petitioners Maciejewski, Johnson, Fischer, Kusreau, Wilkins and Budo, for it presented no evidence to disclose that they had ever acted against it. Had the court below examined the respective roles of the parties herein, as this Court did in *Consumers Union,* it could not have concluded that Entertainment Concepts prevailed against these particular petitioners.

It is beyond doubt that the action was brought against petitioners Maciejewski, Johnson, Fischer, Kusreau, Wilkins and Budo in their official capacities as enforcers of the ordinances solely for the purpose of bringing them under the personal jurisdiction of the trial court, so that any injunctive relief granted could be properly enforced. Indeed, Paragraph 5 of the Complaint specifically states that the parties had been joined in order to make the trial court's orders enforceable. Under such circumstances, it would be both manifestly unjust and erroneous to hold these six petitioners liable for plaintiff's attorneys' fees.

The effect of the ruling of the Court of Appeals as it pertains to the Village officials charged with enforcement of the ordinances, is to allow an award of attorneys' fees

under Section 1988 based solely upon bringing a party under the jurisdiction of the trial court. Section 1988 contains no such language, nor can it be so interpreted. Therefore, the decision of the Court of Appeals should not be allowed to stand.

III. THE DECISION OF THE COURT BELOW CONTRAVENES 42 U.S.C. §1988 BY REMOVING ANY DISCRETION FROM THE TRIAL COURT.

Relying on an earlier ruling that "a prevailing plaintiff should receive fees almost as a matter of course" *Dawson* v. *Pastrick,* 600 F.2d 70, 79 (7th Cir., 1979), the court below concluded that, because the respondent herein had "prevailed," and because there were no "special circumstances," attorneys' fees must be awarded. See p. 19 of the Appendix hereto. In so doing, the court below removed any vestiges of discretion from the District Court in the award of attorneys' fees under Section 1988, a result which is directly contrary to the language of Section 1988 itself.

Compounding the error of the removal of discretion from the District Court, is the absence of any discussion by the court below either of the circumstances of the case or of the way in which the District Court erred.

The facts which were before the District Court clearly supported the denial of fees under the circumstances. Entertainment Concepts had brought an action seeking a declaratory judgment, damages, and preliminary and permanent injunctions. It succeeded only in being granted a permanent injunction which was limited to the parties and the theatres involved in the case. Indeed, respondent presented no evidence of the enforcement of, or intent to enforce, the ordinances. Nor could it have done so, for no one in the Village took any action to enforce the ordi-

nances. Respondent also offered no evidence of damages and the District Court specifically held that the respondent had not established grounds for declaratory judgment or for an injunction against a general enforcement of the ordinance.

The legislative history of Section 1988 discloses that Congress intended to encourage competent attorneys to act as private attorneys general in order to protect the fundamental civil rights of private citizens who would not otherwise be able to bring an action. The comments of Senator Tunney, the drafter of the Attorneys' Fees Award Act, are particularly relevant.

> Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just a individual citizen, suffers.
>
> * * *
>
> When Congress calls upon citizens—either explicitly or by construction of its statutes—to go to court to vindicate its policies and benefit the entire Nation. Congress must also ensure that they have the means to go to court, and to be effective once they get there. No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen . . . 122 Cong. Rec. S 17051 (daily ed. Sept. 29, 1976) (Remarks of Sen. Tunney).

The private attorney general purpose is not furthered by the award of fees in the case at bar. The respondent herein is a corporate entity seeking to protect its right to show movies which it feared would be considered obscene under the Village's ordinance. The respondent's action, then, was clearly one to protect its own commercial

speech rather than to protect the rights of private citizens. The District Court merely enjoined the enforcement of the two ordinances against the respondent herein in the operation of its existing theatre in the Village. There will be no far-reaching effects of that decision, for the respondent never established cause for the District Court to enter a broader order.

The respondent's case focused entirely on protecting its own business interest in the Village and the relief was granted accordingly. It should not now be rewarded under Section 1988 for its self-centered pursuit of the litigation merely because jurisdiction was proper under Section 1983. The only benefits resulting from the case at bar accrued only to the respondent and, if the award of fees is allowed to stand, to its attorneys. As Senator Kennedy stated in the legislative debates on Section 1988:

> No, this bill is not for the purpose of aiding lawyers. The purpose of this bill is to aid civil rights. 122 Cong. Rec. S 17,052 (daily ed. Sept. 29, 1976) (Remarks of Sen. Kennedy)

That purpose is not served by the award of fees in this case. At the same time, it imposes a burden which Senator Tunney believed should not be placed on officeholders—it requires the Village legislators to pay for the privilege of enacting ordinances in good faith and, worse, requires the other Village officials to pay merely because the legislators have given them the power to enforce the law.

In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 954, 19 L.Ed. 2d 1263 (1968), in discussing an award of attorneys' fees under Title II of the Civil Rights Act, this Court pointed out that attorneys' fees are awarded not just to penalize litigants who deliberately pursue untenable arguments, but also to encourage indi-

viduals to seek relief. Under the circumstances of this case, an award of fees would, quite simply, be punitive. This was recognized by the District Court, which properly refused to award fees to the respondents herein. Unlike *Hutto* v. *Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed. 2d 522 (1978) and *Morrison* v. *Ayoob,* No. 79-1923, 49 U.S. L.W. 2098 (3rd Cir., July 29, 1980), upon which the Court of Appeals relied, the instant case involved the foreclosure of any enforcement of new ordinances before there had been any action taken by those charged with its enforcement. In *Hutto* v. *Finney,* on the other hand, this court allowed an award of attorneys' fees against the recalcitrant Arkansas Department of Corrections and acknowledged that the award of attorneys' fees for bad faith served the same purpose as a remedial fine imposed for civil contempt. 98 S.Ct. at 2574. In *Morrison* v. *Ayoob,* the Third Circuit Court of Appeals allowed the award of attorneys' fees in an action in which indigents had sued county justices for the alleged practice of sending indigents convicted of minor civil claims and petty offenses to jail without first affording a right to counsel. Both *Hutto* v. *Fenney* and *Morrison* v. *Ayoob* involved egregious official practices which were successfully terminated due to the civil rights actions. The two cases are vastly distinguishable from the case at bar, which involves no such compelling circumstances.

The decision of the Court of Appeals clearly does not comport with either the language or intent of Section 1988. The reversal of the District Court's denial of attorneys' fees, unsupported as it is by a correct interpretation of both the applicable law and the facts of the case, sets an erroneous and misleading precedent and should therefore not be allowed to stand.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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12/22/80

APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2473

ENTERTAINMENT CONCEPTS, INC., III, *Plaintiff-Appellee,*

v.

ROBERT T. MACIEJEWSKI, etc., BEN BENDER, WILLIAM W. BOESCH, EDWARD T. MECLER, BETTY WERTH, GREGORY SZYMSKI, JOHN A. GRADLE, etc., RICHARD E. JOHNSON, etc., THOMAS FISCHER, etc., MARSHA KUSREAU, SALLY WILKINS, and HELEN BUDO, etc., *Defendants-Appellants.*

Nos. 79-2482 and 79-2517

ENTERTAINMENT CONCEPTS, INC., III,

Plaintiff-Appellant,

v.

ROBERT T. MACIEJEWSKI, etc., BEN BENDER, WILLIAM W. BOESCH, EDWARD T. MECLER, BETTY WERTH, GREGORY SZYMSKI, JOHN A. GRADLE, etc., RICHARD E. JOHNSON, etc., THOMAS FISCHER, etc., MARSHA KUSREAU, SALLY WILKINS, and HELEN BUDO, etc.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 4469—J. Sam Perry, *Judge.*

Argued April 28, 1980—Decided September 23, 1980

Before FAIRCHILD, *Chief Circuit Judge,* BAUER, *Circuit Judge,* and GRANT, *Senior District Judge.**

BAUER, *Circuit Judge.* The defendants appeal an order of the district court permanently enjoining enforcement of two Village of Westmont ordinances. The first ordinance zones so-called "adult" movie theatres as a special use, and the second provides for the suspension or revocation of the license of any theatre that shows obscene movies. Plaintiff cross-appeals the district court's denial of attorneys' fees. We affirm the grant of the permanent injunction and reverse the denial of attorney's fees.

I

Plaintiff Entertainment Concepts, Inc., III operates a motion picture theatre known as Studio Eleven, Cinema I and Cinema II, located in Westmont, Illinois, a suburb of Chicago. Plaintiff has operated the theatre since December 22, 1978. The Studio Eleven is the only movie theatre in the Village of Westmont.

On September 21, 1979, plaintiff began advertising "Coming Soon, Adult Movies" on its marquee. The theatre scheduled the movie "Beneath the Valley of the Ultra-Vixens" to open on November 9, 1979.

On October 25, 1979, plaintiff filed suit in the district court seeking an injunction, declaratory relief and damages under 42 U.S.C. § 1983. Plaintiff alleged that the defendants, who are various elected or appointed municipal officials of the Village of Westmont (hereinafter referred to collectively as "the Village"), had acted under color of their authority to deprive the plaintiff of its con-

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* The Honorable Robert A. Grant, Senior Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

stitutionally protected rights under the First and Fourteenth Amendments to the Constitution of the United States. Plaintiff attacked the constitutionality of two ordinances of the Village of Westmont.

The first ordinance, referred to by the parties as the adult movie zoning ordinance, amends the Village's zoning ordinance. The zoning ordinance of the Village divides various types of business establishments into "permitted" and "special" uses. "Special" uses, in contrast to permitted ones, require the prior authorization of the Village Board of Trustees. Approval may be granted only after a public hearing conducted by the Zoning Board of Appeals, pursuant to public notice as required under Illinois law. ILL. REV. STAT. ch. 24, §§ 11-13-1.1, -6, -7.

Prior to amendment, the Westmont zoning ordinance provided that indoor movie theatres were permitted uses in business districts B-1 and B-2. The amendment, passed on October 1, 1979, created a new category—"Adult movies indoor theatres"—and listed it as a special use. Code of Ordinances of the Village of Westmont § 7.03. The entire ordinance consists of a one-line addition to a chart of permitted and special uses, and the term "adult movies" is not defined.

The second ordinance, referred to by the parties as the license revocation ordinance, prohibits the exhibition of obscene motion pictures. The first two paragraphs of the ordinance, which are not challenged here, state the offense and provide a definition of obscenity.[1] Paragraphs 3 and

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[1] Paragraph 2 of the ordinance, which details the definition of obscenity, was amended on October 29, 1979, four days after plaintiff filed this suit. The parties stipulated to the admission of the new ordinance into evidence and plaintiff was permitted to amend his pleading to include the new ordinance. The amendment does not change the status of the case since paragraph 2 is not challenged as unconstitutional.

4 establish the following procedure and penalties for movies alleged to be obscene:

3. The Mayor shall appoint, subject to Board approval, three (3) Westmont residents to constitute a Movie Review Committee. The Committee shall review motion pictures publicly exhibited within the Village to determine whether or not they are obscene. If a majority of the Movie Review Committee determines a motion picture to be obscene, as defined by paragraph 2, they shall make a written report of their findings to the Mayor. The Mayor, upon receipt of a report by the Movie Review Committee declaring a motion picture obscene, shall invoke the penalties prescribed in paragraph 4 of this section. Nothing herein shall be construed as preventing or discouraging any party who claims to be aggrieved by application of this Ordinance from seeking prompt judicial review of any determination made hereunder.

4. Upon receipt of a report by the Movie Review Committee declaring a motion picture obscene. the Mayor shall conduct an adversary-type hearing at which the motion picture licensee shall have an opportunity to contest the report of the Movie Review Committee. Should the Mayor and Movie Review Committee find that the motion picture in question is in fact obscene, for the first offense. the Mayor shall suspend the motion picture license for a period not to exceed 90 days. For the second offense, the Mayor shall suspend the motion picture license for a period not to exceed 180 days. For the third offense, the Mayor shall permanently revoke the motion picture license.

Code of Ordinances of the Village of Westmont § 5.136.

After a hearing, the district court issued a permanent injunction enjoining the defendants from enforcing the licensing revocation ordinance and the adult movie zoning ordinance. The court denied plaintiff's request for declaratory relief and damages and dismissed the action without costs, each party to bear its own costs.

On December 11, 1979, plaintiff filed a motion for clarification and/or reconsideration of fees and a motion for attorneys' fees. After a hearing, the court denied both motions.

II

The Village, at the outset, challenges the propriety of adjudicating plaintiff's suit at this time. The Village contends that the lack of any proceedings against plaintiff at the time it filed suit renders the present case unripe for judicial resolution. We disagree.

The concept of ripeness is founded in the constitutional requirement that there must be a "case or controversy" before courts can act. That controversy must not be merely speculative; rather it must be a concrete dispute between the parties "in order to avoid overstatement [and] to focus attention on a narrow problem." CURRIE, FEDERAL COURTS 91 (1975).

The requirement of concreteness, however, does not in and of itself require that the plaintiff be the subject of some administrative or judicial proceeding at the time of suit. The Supreme Court has often upheld the grant of injunctive relief against laws before prosecution. *See, e.g., Doe* v. *Bolton,* 410 U.S. 179, 188 (1973) (pregant woman and doctors allowed to challenge an anti-abortion law); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) (no criminal charges pending against school teacher attacking

anti-evolution statute). Plaintiff is the only movie threatre in Westmont. The Village Board of Trustees amended the zoning ordinance one week after the theatre began advertising "adult movies coming soon." Similarly, the Board of Trustees amended the licensing revocation ordinance during the pendency of this suit. Even though it has not specifically threatened plaintiff with prosecution, the Village's conduct indicates more than a broad policy that it will enforce the laws generally. *See Poe* v. *Ullman*, 367 U.S. 497, 501 (1961). Plaintiff can reasonably assert that it fears enforcement of these two ordinances for specific conduct on its part. "Under such circumstances, this Court does not feel it 'necessary that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute he claims deters the exercise of his constitutional rights.'" *Natco Theatres* v. *Ratner*, 463 F. Supp. 1124, 1127 (S.D.N.Y. 1979), *quoting Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974). *See Craig* v. *Boren*, 429 U.S. 190, 194 (1976).

Plaintiff's challenges to the statutes here also do not depend on exhaustion of any administrative procedure. Plaintiff indeed challenges the necessity of having to go through any administrative procedure whatsoever, Plaintiff also alleges that the vagueness of the ordinance makes it uncertain whether the adult movie zoning ordinance applies to it at all; if it does apply, plaintiff attacks the ordinance's lack of standards. "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965). Similarly, no film of plaintiff has been declared obscene.

But plaintiff need not risk closure of its theatre in order to activate judicial review. Plaintiff alleges "infringement of a constitutional right by the administrative process itself." *Moore* v. *East Cleveland*, 431 U.S. 494, 528 n.3 (1977) (Burger, C.J., dissenting); *Vance* v. *Universal Amusement Co., Inc.*, 48 U.S.L.W. 4273 (S. Ct. March 18, 1980). Such a "broadside attack" presents a justiciable controversy. *See Times Film Corp.* v. *Chicago*, 365 U.S. 43, 50 (1961).

We conclude that plaintiff's case is ripe for resolution at this time.

III

Plaintiff challenges the constitutionality of the Westmont adult movie zoning ordinance on several grounds. It contends (1) that the ordinance is so vague that it violates the Due Process clause of the Fourteenth Amendment; (2) that it is invalid under the First Amendment as a prior restraint on protected communication; and (3) that the classification of theatres on the basis of the content of the movies shown violates the Equal Protection clause of the Fourteenth Amendment.[2] We will address each of these arguments in turn.

A

The vagueness doctrine rests on the due process requirement of notice. *Smith* v. *Goguen*, 415 U.S. 566, 572 (1974). Due process requires that an ordinance have a minimum degree of definiteness so that an individual has "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *DeGeorge*, 341 U.S. 223, 231-32 (1951).

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[2] Because of our resolution of this appeal, we do not consider plaintiff's overbreadth argument.

> [W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnotes omitted).

The Westmont adult movie ordinance offends all the values catalogued in *Grayned*. As already noted, the entire adult movie zoning ordinance is nothing more than a one-line addition to the list of permitted and special uses in the Village of Westmont's zoning ordinance. Nothing that could be called a "legislative history" accompanies the ordinance. Heretofore, plaintiff has only shown movies for a general audience. Because it contains no definition of the term "adult," plaintiff does not know if it now must apply for special use permit even if it shows only one "X" rated or "R" rated movie. As the Supreme Court stated in *Smith* v. *Goguen*, this ordinance

> is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard for conduct is specified at all." Such a provision simply has *no* core. This

> absence of any ascertainable standard for inclusion and exclusion is precisely what offends the due process clause.

415 U.S. at 578. (Citations omitted.)

The ordinance also gives no standards for its application by those who administer it. The ordinance provides that

> The Board of Trustees, upon report of the Zoning Board of Appeals and without further public hearing, may grant or deny any proposed Special Use in accordance with applicable Illinois Statutes or may refer it back to the Zoning Board of Appeals for further consideration.

Code of Ordinances of the Village of Westmont § 13.09(D)(1). The only limitation is the "purpose" section of the zoning ordinance. Those purposes[3] simply define

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[3] The ordinance provides:

> In addition to such permitted compatible uses, however, it is recognized that there are other uses which it may be necessary or desirable to allow in a given district but which may have a unique, special, or unusual impact on the use and enjoyment of neighboring property and upon public facilities and therefore need to be carefully regulated with respect to location or operation for the protection of the community. Such uses are classified in this comprehensive amendment as Special Uses and fall into two categories:
>
> 1. Uses either municipally operated or operated by publicly regulated utilities, or uses traditionally affected by public interest.
> 2. Uses entirely private in character which, on account of their peculiar locational need, the nature of the service they offer to the public, and their possible damaging influence on the neighborhood, may have to be established in a district or districts in which they cannot reasonably be allowed as an unrestricted permitted use under the regulations of this comprehensive amendment.

Code of Ordinances of the Village of Westmont § 13.09(A).

two classes of special uses and do not provide any guidance whatsoever. The ordinance in operation thus grants unfettered discretion to the local officials in deciding whether to grant or deny a special use.

The Village attempts to narrow the scope of the ordinance in its brief and oral argument. While admitting that there is no support for such a construction on the face of the ordinance, the Village asserts that it considers "adult" to encompass "movies that are qualitatively different (*i.e.*, sexually explicit) than those [the plaintiff] has been showing for the past eleven months." Even if this were an adequate definition, resort to bootstrapping is no substitute for a legislative definition of the term "adult." Nor could a judicial construction of the ordinance be accomplished without wholesale rewriting of the statute, which is not our function. *See Smith* v. *Goguen*, 415 U.S. at 575; Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 73-74 n.34 (1960).

The Village also challenges plaintiff's standing to litigate the vagueness issue. The Village argues that the ordinance is not vague, at least as to the plaintiff, because of certain statements made by plaintiff in its complaint. Plaintiff alleges in its complaint that it wishes to offer "to the adult citizens . . . motion picture films dealing in sex and nudity [and] that Petitioner has booked into its theatre a motion picture film entitled 'Beneath the Valley of the Ultra-Vixens'; that upon information and belief, said film treats sex in an honest, explicit and forthright manner and Petitioner intends to restrict viewing to those individuals who have attained that age of majority." App. 9. According to the Village, plaintiffs allegations are "concessions" that, when coupled with plaintiff's advertisement on its marquee of "adult movies coming soon," con-

stitute an admission that plaintiff falls within the ordinance.

We recently considered a similar challenge to standing in *Genusa* v. *City of Peoria*, 619 F.2d 1203 (7th Cir. 1980). We held there that the plaintiffs lacked standing to contest, on vagueness grounds, the definition of "adult bookstore" contained in a Peoria ordinance. Plaintiffs lacked standing because they explicitly acknowledged that their bookstores fell within the scope of the definition found in the ordinance. That acknowledgement was not gleaned from the plaintiffs' allegations of intended future conduct; it was an explicit statement. Plaintiffs further expressly admitted that their bookstores' wares dealt in substantially the type of "specified sexual activities" listed in the ordinance. *Id.* at 1209-10. Thus, not only did the *Genusa* plaintiffs expressly acknowledge that they were covered by the ordinance, but the ordinance itself made that admission sustainable because it contained a narrowly drawn definition of "adult bookstore."[4]

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[4] The Peoria Ordinance read:

Adult Book Stores: An establishment having as a substantial portion of its stock in trade, books, magazines, films for sale or viewing on premises by use of motion picture devices or any other coin-operated means, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities," or "Special Anatomical Areas" or an establishment with a segment or section devoted to the sale or display of such material.

The terms "specified sexual actvities" and "specified anatomical areas" were defined as follows:

G. *Specified Sexual Activities* are any of the following conditions:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts or representations of acts of human masturbation, sexual intercourse or sodomy, bestiality, oral copulation or

(footnote continued)

In contrast, plaintiff has made no such acknowledgement here, nor is there any definition of adult in the ordinance. Plaintiff's "concessions," even if they may properly be characterized as such, demonstrate only that it is unsure whether it falls within the ordinance and that it fears enforcement. Because of the ordinance, plaintiff has not yet shown "Beneath the Valley of the Ultra-Vixens." The deterrent effect of the ordinance is thus "both real and substantial." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976). Plaintiff's allegations or defendants' oral assertions are no substitute for narrow statutory language.

Plaintiff has standing to contest the Westmont ordinance on vagueness grounds.[5] The ordinance "requires the do-

(footnote continued)

flagellation;

3. Fondling or erotic touching of human genitals, pubic region, buttock or female breast.

4. Excretory functions as part of or in connection with any activities set forth in (1) through (3) above.

H. *Specified Anatomical Areas* are any of the following conditions:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, or pubic hair (b) buttock and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely opaquely covered.

The definitions are virtually identical to definitions in the Detroit ordinance that was at issue in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 53 nn. 4 & 5, except for subsection G.4, which did not appear in the Detroit ordinance. See *Genusa*, 619 F.2d at 1209. The *Young* court also declined to rule on a vagueness challenge to the Detroit ordinance. *Young*, 427 U.S. at 61.

[5] Since plaintiff is asserting its own First Amendment rights, we need not consider whether the doctrine of vicarious standing or its exceptions apply. *See generally Genusa*, 619 F.2d at 1209-10.

ing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1927). The ordinance further provides absolutely no guide for its enforcement. We therefore hold that the ordinance is unconstitutionally vague and unenforceable.

B

Plaintiff further charges that, whatever the definition of "adult," the ordinance is an impermissable classification of speech based on content and is a prior restraint on protected communication. We agree that the ordinance's unequal treatment of "adult" and non-adult movies amounts to a violation of Equal Protection guaranteed by the Fourteenth Amendment and that the requirement of a special use permit is an unconstitutional prior restraint.

In *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 70-71, the Supreme Court recognized that the content of speech may be a valid classification for zoning purposes. That classification, however, must serve a valid state interest and not impermissibly suppress protected speech. *Id.* at 71-72.

While both the plurality and concurring opinions in *Young* explore the relationship between the regulation and the state interest advanced, Justice Powell's concurrence followed the four-part test set forth in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). *See Young*, 427 U.S. at 79-80 (Powell, J., concurring). We recently adopted that approach in *Genusa*, 619 F.2d at 1114 n.27, and will follow it here.

The Village admittedly has the power to make zoning ordinances and is empowered under Illinois law to desig-

nate some uses as special uses. *See Berman* v. *Parker*, 348 U.S. 26, 32 (1954); ILL. REV. STAT. ch. 24, § 11-13-1.1. It thus meets the first test of *O'Brien*.

The second and third tests are that the regulation must further an important or substantial governmental interest and that the governmental interest must be unrelated to the suppression of free speech. *O'Brien*, 391 U.S. at 377; *Young*, 427 U.S. at 79-80 (Powell, J., concurring). The *Young* ordinance required that a defined class of adult uses be separated by a distance of 500 feet from one another. The Court held that the regulation served a valid state interest in preventing urban blight. The *Young* ordinance also did not act to suppress speech because it did not prohibit, but merely regulated the location of adult uses. *Young*, 427 U.S. at 71-73, 80 (Powell, J., concurring). *See also Genusa*, 619 F.2d at 1211.

The Village of Westmont does not even attempt to advance a legitimate governmental interest to support the zoning ordinance. The Village admits in its brief that it enacted the ordinance to "regulate the showing of sexually explicit movies." Village Brief at 11. Since its aim (and the ordinance's language) sweeps beyond unprotected obscenity, the Village's expressed aim is the suppression of speech.

The Village concedes that Westmont does not require a special use permit for any movie theatre except "adult" theatres. All other theatres operate without prior authorization. The special use requirement is, therefore, a prior restraint on speech that has as its "operative distinction" the content of the movies shown. *Genusa*, 619 F.2d at 1214. The special use mechanism is operationally similar to the licensing procedure struck down in *Genusa*. To paraphrase *Genusa*, movie theatres showing one type

of films must acquire a permit before allowed to operate, movie theatres showing another type of films do not need a permit. *Id.*[6]

We doubt that any special use scheme for regulation of adult movie theatres would be constitutionally valid because of the prior restraint involved. Like the adult bookstores in *Genusa,* adult movie houses "may not . . . be singled out for special regulation unless the [Village] can demonstrate that such action is narrowly devised to further substantial and legitimate state interests unrelated to censorship or the suppression of protected expression." *Genusa,* 619 F.2d at 1214. Westmont "has come forward with no such justification," *id.* at 1214-15, and the special use ordinance is consequently invalid.

Moreover, even if the ordinance could be viewed as a means to regulate only the location of "adult" uses, the means chosen to attain this end are impermissible. The special use scheme fails the fourth test of *O'Brien* that any "incidental restriction on . . . First Amendment freedoms [be] no greater than is essential to the furtherance of the substantial governmental interest." 391 U.S. at 377. We upheld the simple licensing requirement in *Genusa* as incidental to the enforcement of the distance restriction there. Issuance of a license (absent the inspection requirement struck down in *Genusa*) was automatic and occurred within a short time period. *Genusa,*

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[6] Of course, we must distinguish the type of prescreening for obscene movies approved in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957). A cursory glance reveals substantial differences between the ordinance in *Kingsley* and here. Since Westmont does not even pretend that its goal is to prevent the exhibition of only obscene movies, we need not delve into the differences. Counsel for the Village, however, would be wise to refer to *Kingsley* in drafting any new ordinance.

619 F.2d at 1212-13. Although the Village contends that the ordinance does not flatly prohibit adult movie theatres, the Westmont officials possess unbridled discretion to grant or deny a special use permit. In addition, the ordinance proscribes no time period at all for decisions. Instead of merely regulating location, the ordinance thus grants the Village officials power to prohibit the operation of any adult movie theatre.

In sum, the ordinance satisfies none of the requirements for constitutional regulation of "adult" fare under *Young* v. *American Mini Theatres* and *Genusa*. We affirm the judgment of the district court permanently enjoining its enforcement.

IV

The second ordinance challenged here provides for the revocation or suspension of a movie theatre's license upon a finding of obscenity by the Movie Review Board and the Mayor. We hold that the section dealing with the finding of obscenity is constitutionally insufficient because it fails to provide sufficient procedural protection of speech. We further hold that the penalty of suspension or revocation is an unconstitutional prior restraint.

Obscenity is not speech protected by the Constitution. *Roth* v. *United States*, 354 U.S. 476, 481 (1957); *Miller* v. *California*, 413 U.S. 15, 36 (1973). However, a municipality "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant*, 367 U.S. 717, 731 (1961). Rather, "the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.'" *Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971), *quoting Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963).

Freedman v. *Maryland,* 380 U.S. 51 (1965), set down the requirements that must be met by an ordinance that purports to regulate the showing of obscene movies.

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Southeastern Promotions, Ltd. v. *Conrad,* 420 U.S. 546. 560 (1975), *citing Freedman* v. *Maryland,* 380 U.S. at 58-60.

The Westmont ordinance fails to meet any of the *Freedman* requirements. Obscenity is determined solely by the Movie Review Board and the Mayor, whose decision is final. There is no provision for judicial participation at all. The ordinance does state that "[n]othing herein shall be construed as preventing or discouraging any party who claims to be aggrieved by application of this Ordinance from seeking prompt judicial review of any determination made hereunder." This section only highlights that the burden for judicial review is on the exhibitor, and not on the Village. It thus violates the first and third *Freedman* standards. *Compare Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973) (no restraint on the exhibition of films until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected) *and Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957) (praised in *Freedman* v. *Maryland,* 380 U.S. at 60, as a model statute). *See also Teitel Film Corp.* v. *Cusack,* 390 U.S. 139 (1968) (no provision for prompt judicial decision).

The ordinance does not contain the vice of prohibiting the showing of any particular films or restraining ex-

hibition because the Movie Review Board reviews only "publicly exhibited" films. But the enforcement mechanism is constitutionally defective in two additional ways. First, the ordinance does not provide that any penalty be stayed pending judicial review, in violation of *Freedman*. 380 U.S. at 59. Second, the penalty itself is unconstitutional. Upon a determination of obscenity by the Mayor, the ordinance provides for the suspension of the theatre's license for the first and second offense, and then revocation for the third offense. The ordinance thus authorizes a prior restraint against the showing of any film based solely upon an administrative determination of obscenity of past films. The penalty is precisely of the type condemned by *Near* v. *Minnesota*, 283 U.S. 710, 713 (1931) and most recently in *Vance* v. *Universal Amusement Co., Inc.*, 48 U.S.L.W. 4273 (S. Ct. March 18, 1980). In *Vance*, the Court struck down a Texas statute allowing the issuance of an injunction against the operation of a theatre adjudged to be maintaining a nuisance. Another Texas statute defined the exhibition of obscene materials as a "public nuisance." The court of appeals held that

> The statutes allow the state to close, for one year, a theatre that has exhibited one obscene film. Unless a bond . . . is posted, the showing of *any* motion picture is punishable by contempt of court. Thus, future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near* v. *Minnesota*.

Universal Amusement Co., Inc. v. *Vance*, 587 F.2d 159, 165 (5th Cir. 1978) (*en banc*). The Supreme Court affirmed, stating that the statute had the effect of authorizing "prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene." 48 U.S.L.W. at 4275.

There is no principled distinction between the Westmont ordinance and the one struck down in *Vance*. Here, too, a license of a theatre may be revoked for showing films that have not been judicially ruled to be obscene. The provision for first a ninety day suspension, then 180 day suspension, and then permanent revocation does not cure the scheme of its constitutional infirmity. No matter how long the restraint, the punishment is still the same —prohibition of "future conduct that may fall within the purview of the first amendment . . . after a finding of unprotected present conduct." 587 F.2d at 165.

The district Court was therefore correct in permanently enjoining the enforcement of the Westmont ordinances.

V

Plaintiff cross-appeals the district court's denial of attorneys' fees. Plaintiff seeks attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. That section provides in relevant part:

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

As we recently held in *Dawson* v. *Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979) "[a]lthough the Fees Act on its face provides that whether to award attorneys' fees is within the discretion of the court, the history of the provision makes it clear that the trial court's discretion is narrow." The Senate Report indicated that fees should only be denied when special circumstances would render an award unjust. *Id.* We concluded that "a prevailing plaintiff should receive fees almost as a matter of course." *Id.*; *Davis* v. *Murphy*, 587 F.2d 362, 364 (7th Cir. 1978);

Konczak v. *Tyrrell,* 603 F.2d 13, 19 (7th Cir. 1979), *cert. denied,* 100 S.Ct. 668 (1980).

It cannot be seriously doubted that plaintiff is the prevailing party here. Plaintiff essentially succeeded in obtaining the relief he sought in his claims on the merits, even though he did not obtain damages or a declaratory judgment. The case cannot be considered a draw. *Dawson* v. *Pastrick,* 600 F.2d at 79 n.13; *Bagby* v. *Beal,* 606 F.2d 411, 414-15 (3d Cir. 1978). *Compare Muscare* v. *Quinn,* 614 F.2d 577 (7th Cir. 1980) (plaintiff prevailed on only one substantive claim) and *Roesel* v. *Joliet Wrought Washer Co.,* 596 F.2d 183, 187 (7th Cir. 1979) (each party prevailed on one issue; no fees awarded).

Nor are there any special circumstances which justify denial of an award. The defendants claim that an award of attorneys' fees would be improper here because the individual defendants have qualified immunity from liability. Defendants argue that absent "bad faith" an award against local officials is unjustified. We disagree.

Congress specifically addressed official liability for attorneys' fees in § 1988. The House Report stated

> Furthermore, while damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severly limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H. Rep. No. 94-1558, 94th Cong., 2nd Sess. 9 (1976)[7]

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[7] A footnote in the cited paragraph contains a citation to *Pierson* v. *Ray,* 386 U.S. 547, 555 (1967), in which the Supreme Court indicated that Congress could abrogate judicial immunity.

The Third Circuit recently held that this legislative history showed that Congress intended to abrogate judicial immunity in § 1988. *Morrison* v. *Ayoob,* No. 79-1923, 49 U.S.L.W. 2098 (3d Cir. July 29, 1080). We agree, and hold that Congress also intended the abrogation of any immunity possesed by the Village officials. *Accord, Supreme Court of Virginia* v. *Consumers Union of the United States,* 48 U.S.L.W. 4620, 4625 (S. Ct. June 2, 1980) (Fees Act permits fees award against state agency not immune from injunctive relief).

Defendants make some reference to their ability to pay a fee award. First, ability to pay is not a "special circumstance" that will bar an award of attorneys' fees to a successful plaintiff. *Bunn* v. *Central Realty of Louisiana,* 592 F.2d 891 (5th Cir. 1979). *Compare Brown* v. *Stackler,* 612 F.2d 1057 (7th Cir. 1980) (denial of fees justified where attorney submitted grossly inflated bill for "simple" case). Second, even though the Village is not a named defendant, it may be the appropriate party to pay attorneys' fee. *Hutto* v. *Finney,* 437 U.S. 678, 699-700 & n. 32 (1978). The legislative history of the provision indicates that Congress anticipated that the fees would be paid from the funds of the Village:

> [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. Report No. 1011, 94th Cong. 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Admin. News 5908, 5913. *See Skehan* v. *Board of Trustees of Bloomsburg State College,*

590 F.2d 470, 494-96 (3d Cir. 1978), *cert. denied,* 100 S.Ct. 61 (1979).

Neither party had the opportunity to argue below how an appropriate award could be framed. On remand, the district court should weigh the various factors considered in *Hutto* v. *Finney,* 437 U.S. at 699, in determining which Village entity is responsible for the award. *See Morrison* v. *Ayoob,* slip op. at 7-8.

The district court should also determine the proper amount of attorneys' fees. We recently adopted the Fifth Circuit's standard in *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974), for attorneys' fees awards. *Hampton* v. *Hanrahan,* 600 F.2d 600, 643 (7th Cir. 1979), *judgment rev'd in part,* 48 U.S.L.W. 3777 (S. Ct. June 2, 1980), held that

> [F]actors bearing on the amount of the award will include (1) the time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal services; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.

Disciplinary Rule 2-106 of the American Bar Association Code of Professional Responsibility adopts practically identical standards. *See Muscare* v. *Quinn,* 614 F.2d at 579. The district court should also consider whether plaintiff is entitled to attorneys' fees for the prosecution of this appeal. *Davis* v. *Murphy,* 587 F.2d at 364.

We hold that the defendants are liable for attorneys' fees in their official capacities. We remand to the district court for the framing of an appropriate award. The decision of the district court is affirmed in part, reversed and remanded in part.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> §1988 (in pertinent part). The Civil Rights Attorney's Fees Awards Act.
>
> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Illinois Constitution of 1970, Article VII: Local Government:

> Section 1. Municipalities and Units of Local Government
>
> "Municipalities" means cities, villages and incorporated towns, "Units of local government" means counties, municipalities, townships, special districts, and units, designated as units of local government by law, which exercise limited governmental powers or powers in respect to limited governmental subjects, but does not include school districts.
>
> Section 7. Counties and Municipalities Other Than Home Rule Units
>
> Counties and municipalities which are not home rule units shall have only powers granted to them by law and the powers (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government; (2) by referendum, to adopt, alter or repeal their forms of government provided by law; (3) in the case of municipalities, to provide by referendum for their officers, manner of selection and terms of office; (4) in the case of coun-

ties, to provide for their officers, manner of selection and terms of office as provided in section 4 of this Article; (5) to incur debt except as limited by law and except that debt payable from ad valorem property tax receipts shall mature within 40 years from the time it is incurred; and (6) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

Illinois Revised Statutes (1979), Chapter 24: Cities and Villages:

Section 1-1-2(2). Definitions—General provisions

(2) "Corporate authorities" means (a) the city council or similar body when the reference is to cities, (b) the board of trustees or similar body when the reference is to villages or incorporated towns, and (c) the council when the reference is to municipalities under the commisison form of municipal government.

Section 1-2-1. Ordinances and Rules to Execute Powers—Limitations on Punishments

The corporate authorities of each municipality may pass all ordinances and make all rules and regulations proper or necessary, to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper. No fine or penalty, however, except civil penalties provided for failure to make returns or to pay any taxes levied by the municipality shall exceed $500 and no imprisonment authorized in Section 1-2-9 for failure to pay any fine, penalty or cost shall exceed 6 months for one offense.

Section 11-13-1. Objectives—Classification, regulation and location of uses—Nonconforming uses

To the end that adequate light, pure air, and safety from fire and other dangers may be secured, that the

taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, that the hazards to persons and damage to property resulting from the accumulation of runoff of storm or flood waters may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted, and to insure and facilitate the preservation of sites, areas, and structures of historical, architectural and aesthetic importance; the corporate authorities in each municipality have the following powers:

(1) To regulate and limit the height and bulk of buildings hereafter to be erected; (2) to establish, regulate and limit, subject to the provisions of Division 14 of this Article 11, the building or set-back lines on or along any street, traffic-way, drive, parkway or storm or floodwater runoff channel or basin; (3) to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; (4) to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential, and other uses; (5) to divide the entire municipality into districts of such number, shape, area, and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot areas, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this Division 13; (6) to fix standards to which buildings or structures therein shall conform; (7) to prohibit uses, buildings, or structures incompatible with the character of such districts; (8) to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed under this Division 13; and (9) to classify, to regulate and restrict the use of property on the basis of

family relationship, which family relationship may be defined as one or more persons each related to the other by blood, marriage or adoption and maintaining a common household.

Section 11-13-1.1. Special Uses

The corporate authorities of any municipality may in its ordinances passed under the authority of this Division 13 provide for the classification of special uses. Such uses may include but are not limited to public and quasi-public uses affected with the public interest, uses which may have a unique, special or unusual impact upon the use of enjoyment of neighboring property, and planned developments. A use may be a permitted use in one or more zoning districts, and a special use in one or more other zoning districts. A special use shall be permitted only after a public hearing before some commission or committee designated by the corporate authorities, with prior notice thereof given in the manner as provided in Sections 11-13-6 and 11-13-7. A special use shall be permitted only upon evidence that such use meets standards established for such classification in the ordinances, and the granting of permission therefor may be subject to conditions reasonably necessary to meet such standards. Amended by P.A. 76-580, §1, eff. July 31, 1969.

Section 11-42-5. Hawkers and peddlers—Shows—Places for eating or amusement

The corporate authorities of each municipality may license, tax, regulate, or prohibit hawkers, peddlers, pawnbrokers, itinerant merchants, transient vendors of merchandise, theatricals and other exhibitions, shows, and amusements and may license, tax, and regulate all places for eating or amusement.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79-C-4469

ENTERTAINMENT CONCEPTS, INC., III, ETC.,

Petitioner,

v.

ROBERT T. MACIEJEWSKI, ETC., ET AL.,

Defendants.

COMPLAINT FOR PRELIMINARY INJUNCTION,
PERMANENT INJUNCTION,
DECLARATORY JUDGMENT AND DAMAGES

* * *

1. This is a civil action whereby Petitioner prays for a Preliminary and Permanent Injunction enjoining the Defendants from enforcement of certain ordinances to be hereinafter designated, on the ground that the same are unconstitutional as written, or in the application thereof to the case at bar. Further, Petitioner prays for a Declaratory Judgment to determine the constitionality of said ordinances of the Village of Westmont, DuPage county, Illinois, as written and as applied and/or in their threatened application to the case at bar. The allegations to be set forth in the premises establish that there are presented questions of actual controversy between the parties involving substantial constitutional issues in that said ordinances, as written and/or as applied and/or in

their threatened application are repugnant to the rights of the Petitioner herein, its agents, servants and employees under the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions presented by *Title 28 USCA 1343 (3)* which provides in pertinent part that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person

> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . ."

and the organic law which further authorized the institution of this suit founded on *Title 42 USCA 1983,* which provides in pertinent part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, or any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Prayer for declaratory relief is founded on *Rule 57* of the *Federal Rules of Civil Procedure* as well as *Title 28 USCA 2201,* which provides in pertinent part:

> ". . . any Court of the United States upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. . ."

The jurisdiction of the Court to grant injunctive relief is conferred on the Court by *Title 28 USCA 2202,* which provides:

> "Further necessary or proper relief based on a declaratory judgment of decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

The jurisdiction of the Court is also invoked under *Title 28 USCA 1331,* this being a civil action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum and value of Ten Thousand ($10,000.00) Dollars and applies under the Constitution and laws of the United States.

3. That Petitioner, ENTERTAINMENT CONCEPTS, III, is an Illinois corporation; that your Petitioner is in the business of operating a motion picture theatre in the State of Illinois and Petitioner wishes to continue to operate its theatre located at 430 E. Ogden, Westmont, Illinois, known as the Studio Eleven; that said premises has been operated as a motion picture theatre in said municipality since December 22nd, 1978, and has been licensed to do so by the Village of Westmont pursuant to, and in accordance with, the ordinances of said Village, custom and usage.

That the aforesaid motion picture theatre has exhibited motion picture films to the general public and wishes to continue exhibiting films in the future; that the setting of a commercial motion picture theatre as well as the films exhibited therein are a form of expression presumptively entitled to the protections of the free speech and press provisions of the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

4. That ROBERT T. MACIEJEWSKI is named as Defendant individually and in his capacity as Mayor and/or President of the Village Board of Trustees of the Village of Westmont, County of DuPage, Illinois, having the authority conferred upon him by the statutes of the State of Illinois and the ordinances of the Village of Westmont over the administration, investigation and procedures of the agencies of said village and, specifically, the authority to suspend and/or revoke motion picture theatre licenses pursuant to Article VII, §5-136, et seq., of the Code of Ordinances of the Village of Westmont.

BEN BENDER, WILLIAM W. BOESCH, EDWARD T. MECLER, BETTY WERTH, GREGORY SZYMSKI and JOAN A. GRADLE are named as Defendants herein individually and in their official capacities as duly elected and/or appointed Trustees of the Village of Westmont, DuPage County, Illinois, having the authority conferred upon them by the ordinances of the Village of Westmont and the statutes of the State of Illinois with the responsibility for, and general supervision and control over, the administration procedure and application of the ordinances of the Village of Westmont, including authority conferred upon them by the Zoning Ordinance of said village to approve or disapprove "special use" permits.

RICHARD E. JOHNSON is named as Defendant in his official capacity as Chief of Police, of the Village of Westmont, having cognizance and control of the law enforcement officers of the village and the specific responsibility, among other things, for the enforcement of the ordinances of the Village of Westmont within said municipality.

THOMAS FISCHER is named as Defendant in his official capacity as Director of Building and Zoning, Village of Westmont, Illinois, having the authority conferred

upon him by the ordinances of the Village of Westmont, the statutes of the State of Illinois, custom and usage, with the responsibility for and control over all administrative, procedural, criminal and civil matters applicable to the building and zoning provisions of said village, and specifically with the authority conferred upon him by statute and ordinance to institute and enforce by means of criminal and/or civil proceedings in a court of appropriate jurisdiction, the Building and Zoning Codes of the Village of Westmont.

MARSHA KUSREAU, SALLY WILKINS and HELEN BUDO are named Defendants in their official capacities as members of the Village of Westmont Movie Review Board, having been appointed to said Board by Defendant ROBERT T. MACIEJEWSKI, pursuant to Article VII, §5-136, et seq., of the Code of Ordinances of the Village of Westmont, Illinois.

* * *

6. That, at all times relevant hereto, Defendants and/or their agents, servants, employees and attorneys and others acting under their direction and control, and each of them separately and in concert, acting under color and pretense of law, to-wit: under color of Municipal Ordinances of the Village of Westmont, custom and usage of Article VIII, §5-136, et seq., of the Code of Ordinances of the Village of Westmont and the Zoning Ordinance, Village of Westmont, Illinois, Article XIII §13-09, et seq., and Article VII, §7.03, et seq., of the Code of Ordinances, Village of Westmont, Illinois, each of the Defendants, individually, and/or in concert, engaged in the illegal conduct hereinafter mentioned, to the irreparable injury to Petitioner and have deprived, and are continuing to deprive, and threaten to further deprive Petitioner, its agents, ser-

vants and employees, of their rights, privileges and immunities secured to them by the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

A photocopy of Article VII, §5-136, et seq., of the Code of Ordinances of the Village of Westmont is attached hereto as Petitioner's Exhibit A in support of this Complaint and it incorporated herein by reference.

A photocopy of the Zoning Ordinance, Article XIII, §13.09, et seq., and Article VII, §7.03, et seq., of the Code of Ordinances, Village of Westmont, Illinois, is attached hereto as Petitioner's Exhibit B in support of this Complaint and is incorporated herein by reference.

* * *

8. That since December 22nd, 1978, Petitioner has been duly licensed to operate the Studio Eleven Cinema located at 430 E. Ogden Avenue, Westmont, Illinois; that since that date, Petitioner has operated dual motion picture theatres commonly known as the Cinema I and the Cinema II, and has offered to the general public motion picture films for viewing; that Petitioner wishes to continue offering motion picture films to the public and does, as well, wish to offer to the adult public of the said village, county and State of Illinois as well as citizens of the other forty-nine (49) states who may visit the Village of Westmont and wish to view same, motion picture films dealing in sex and nudity, which films are presumptively protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States;* that Petitioner has booked into said theatre a motion picture film entitled "Beneath the Valley of the Ultra-Vixens"; that upon information and belief, said film treats sex in an honest, explicit and forthright manner and Petitioner intends to restrict viewing to those individuals who have attained the age of majority; that

said film is scheduled to commence its engagement on the 9th day of November, 1979.

* * *

11. That in furtherance of said unlawful design, and for no other reason than to harass and intimidate your Petitioner herein, the defendants—well knowing the patent illegality of same—enacted §5-136, et seq., of the Code of Ordinances of the Village of Westmont heretofore designated as Petitioner's Exhibit A.

* * *

13. That on the 21st day of September, 1979, Petitioner commenced advertising on its marquee "Coming Soon Adult Movies"; that immediately thereafter and on the 1st day of October, 1979, the Defendants, individually and/or in concert, and in furtherance of their design to prevent the exhibition of films which Defendants deemed offensive, conspired together and enacted a zoning provision which prohibited the exhibition of "Adult" films without a special use permit, said ordinance heretofore designated as Petitioner's Exhibit B; that said zoning provision was amended with the express purpose of harassing, delaying and ultimately preventing the intended exhibition of motion picture films which deal honestly and forthrightly with sex and nudity and which are presumptively protected by the *First Amendment* to the *Constitution of the United States.*

* * *

WHEREFORE, Petitioner prays:

1. That Defendants be required to forthwith answer the Complaint in conformance with the rules and practices of this Honorable Court.

2. That a Declaratory Judgment be rendered declaring Article VII, §5-136, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Ex-

hibit A and the Zoning Ordinance, Article XIII, §13.09 and Article VII, §7.03, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit B to be unconstitutional on their face, or, in the alternative, that this Court declare the application and/or threatened application of the aforementioned ordinances to Petitioner to be unconstitutional.

3. That a Preliminary Injunction issue from this Court upon hearing, restraining Defendants, and/or their agents, servants, employees and attorneys and others under their direction and control, pending a hearing and determination on Petitioner's application for Permanent Injunction, from enforcing or executing and/or threatening to enforce or execute Article VII, §5-136, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit A and the Zoning Ordinance, Article XIII, §13.09 and Article VII, §7.03, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit B, by arresting or threatening to arrest and/or instituting and/or threatening to institute civil proceedings against Petitioner, its agents, servants and/or employees or harassing, threatening to close, or closing Petitioner's business premises under color and authority of said ordinances.

* * *

5. That this Court issue a Permanent Injunction restraining and enjoining Defendants and/or their agents, servants, employees and attorneys and others acting under their direction and control from enforcing or executing and/or threatening to enforce or execute Article VII, §-136, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit A and the Zoning Ordinance, Article VIII, §13.09, and Article VII, §7.03, et seq, of the Code of Ordinances of the Village

of Westmont, designated as Petitioner's Exhibit B, by arresting or threatening to arrest and/or threatening penal and/or civil sanction and/or instituting and/or threatening to institute civil proceedings against Petitioner, its agents servants and its employees or harassing, threatening to close or closing petitioner's business premises under color and authority of said ordinances.

* * *

7. That judgment be rendered herein for damages in favor of Petitioner, ENTERTAINMENT CONCEPTS III, against the Defendants, ROBERT T. MACIEJEWSKI, BEN BENDER, WILLIAM W. BOESCH, EDWARD MECLER, BETTY WERTH, GREGORY SZYMSKI and JOHN A. GRADLE, individually, and jointly and severally, in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars; and

8. That Petitioner have such other and further relief as may be appropriate under the circumstances in this case, together with costs and attorney fees pursuant to 42 USCA 1988.

* * *

of Westmont, custom and usage of Article VIII, §5-136, et seq, of the Code of Ordinances of the Village of Westmont and the Zoning Ordinance, Village of Westmont, Illinois, Article XIII §13-09, et seq, and Article VII, §7.03, et seq, of the Code of Ordinances, Village of Westmont, Illinois, each of the Defendants, individually, and/or in concert, engaged in the illegal conduct hereinafter mentioned, to the irreparable injury to Petitioner and have deprived, and are continuing to deprive, and threaten to further deprive Petitioner, its agents, servants and employees, of their rights, privileges and immunities secured to them by the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

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* * *

11. That in furtherance of said unlawful design, and for no other reason than to harass and intimidate your Petitioner herein, the Defendants—well knowing the patent illegality of same—enacted §5-136, et seq, of the Code of Ordinances of the Village of Westmont heretofore designated as Petitioner's Exhibit A.

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13. That on the 21st day of September, 1979, Petitioner commenced advertising on its marquee "Coming Soon Adult Movies"; that immediately thereafter and on the 1st day of October, 1979, the Defendants, individually and/or in concert, and in furtherance of their design to prevent the exhibition of films which Defendants deemed offensive, conspired together and enacted a zoning provision which prohibited the exhibition of "Adult" films without a special use permit, said ordinance heretofore designated as Petitioner's Exhibit B; that said zoning provision was amended with the express purpose of harassing, delaying and ultimately preventing the intended exhibition of motion picture films which deal honestly and forthrightly with sex and nudity and which are presumptively protected by the *First Amendment* to the *Constitution of the United States.*

* * *

WHEREFORE, Petitioner prays:

1. That Defendants be required to forthwith answer the Complaint in conformance with the rules and practices of this Honorable Court.

2. That a Declaratory Judgment be rendered declaring Article VII, §5-136, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit A and the Zoning Ordinance, Article XIII, §13.09 and Article VII, §7.03, et seq, of the Code of Ordinances

of the Village of Westmont, designated as Petitioner's Exhibit B to be unconstitutional on their face, or, in the alternative, that this Court declare the application and/or threatened application of the aforementioned ordinances to Petitioner to be unconstitutional.

3. That a Preliminary Injunction issue from this Court upon hearing, restraining Defendants, and/or their agents, servants, employees and attorneys and others under their direction and control, pending a hearing and determination on Petitioner's application for Permanent Injunction, from enforcing or executing and/or threatening to enforce or execute Article VII, §5-136, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit A and the Zoning Ordinance, Article XIII, §13.09 and Article VII, §7.03, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit B, by arresting or threatening to arrest and/or threatening penal and/or civil sanction and/or instituting and/or threatening to institute civil proceedings against Petitioner, its agents, servants and/or employees or harassing, threatening to close, or closing Petition's business premises under color and authority of said ordinances.

* * *

5. That this Court issue a Permanent Injunction restraining and enjoining Defendants and/or their agents, servants, employees and attorneys and others acting under their direction and control from enforcing or executing and/or threatening to enforce or execute Article VII, §5-136, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit A and the Zoning Ordinance, Article XIII, §13.09, and Article VII, §7.03, et seq, of the Code of Ordinances of the Village of Westmont, designated as Petitioner's Exhibit B, arrest-

ing or threatening to arrest and/or threatening penal and/or civil sanction and/or instituting and/or threatening to institute civil proceedings against Petitioner, its agents servants and/or employees or harassing, threatening to close or closing Petitioner's business premises under color and authority of said ordinances.

* * *

7. That judgment be rendered herein for damages in favor of Petitioner, ENTERTAINMENT CONCEPTS III, against the Defendants, ROBERT T. MACIEJEWSKI, BEN BENDER, WILLIAM W. BOESCH, EDWARD MECLER, BETTY WERTH, GREGORY SZYMSKI and JOHN GRADLE, individually, and jointly and severally, in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars; and

8. That Petitioner have such other and further relief as may be appropriate under the circumstances in this case, together with costs and attorney fees pursuant to 42 USCA 1988.

* * *

AFFIDAVIT

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

On the 25th day of October, 1979, did personally appear GARY HERTZLER, President of ENTERTAINMENT CONCEPTS III, an Illinois corporation, who after being duly sworn did depose and state that he has read the foregoing Complaint and the factual allegations contained therein are both true and correct to the best of his information and belief.

Gary Hertzler

GARY HERTZLER

President of ENTERTAINMENT CONCEPTS III

Subscribed and sworn to before me the undersigned, a Notary Public in and for the County and State as aforesaid, on the day, month and year first above written.

Donna Pelitz